The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 25-020

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Liz Vladeck, General Counsel, attorneys for respondent, by Emily A. McNamara, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her son's private services delivered by Headway Services (Headway) for the 2022-23 school year. The district cross-appeals from the failure of the IHO to address the district's motion to dismiss the proceeding for lack of subject matter jurisdiction. The appeal must be sustained, the cross-appeal must be dismissed, and the matter remanded to the IHO for further proceedings.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that

"[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

Due to the procedural posture of this appeal a full recitation of the student's educational history is unnecessary.

Briefly, a CSE convened on May 11, 2022, found the student eligible for special education as a student with autism, and developed an IESP with an implementation date of May 25, 2022 (Parent Ex. B at p. 1). The May 2022 CSE recommended that the student receive seven periods per week of direct special education teacher support services (SETSS) in a group in Yiddish and related services consisting of two 30-minute sessions per week of individual occupational therapy (OT), two 30-minute sessions per week of individual physical therapy (PT), three 30-minute sessions per week of individual speech-language therapy in Yiddish, and one 30-minute session per week of group counseling services in Yiddish (id. at pp. 15-16). The May 2022 IESP noted that the student was parentally placed in a nonpublic school (id. at p. 18).

On May 24, 2023, the parent, through a third-party, submitted to the district a district form indicating the parent wanted special education services to be provided to the student at the student's nonpublic school for the 2023-24 school year (Parent Ex. C).

On October 27, 2023, the parent signed an agreement with Headway for the delivery of seven sessions per month of 1:1 SETSS for the 10-month 2023-24 school year (Parent Ex. D).

A. Due Process Complaint Notice

In a due process complaint notice dated October 7, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A at p. 1). The parent alleged the district did not convene a CSE to develop an IEP or IESP for the student for the 2023-24 school year (id. at p. 2). The parent alleged the last IESP created for the student was the May 2022 IESP, that the district failed to implement the IESP for the 2023-24 school year, and that the parent was unable to locate a provider "willing to accept the [district] contract" (id.). According to the parent, "[w]ithout the supports, the parental mainstream placement [wa]s untenable" (id.). As relief, the parent requested compensatory education to be funded at "the prospective provider's contracted rate"; and an order directing the district to fund the program outlined in the May 2022 IESP for the 2023-24 school year "at the provider's contracted rate" (id. at p. 3).

B. Impartial Hearing Officer Decision

Prior to the first date of the impartial hearing, the district filed a motion to dismiss dated November 5, 2024, arguing that the IHO had no jurisdiction over IESP implementation claims (see IHO Ex. I).

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on November 18, 2024 and concluded the same day (Tr. pp. 1-40). In a decision dated November 27, 2024, the IHO found that the district properly raised the affirmative defense of the June 1 requirement; that the parent did not provide timely notice that she was requesting services for the 2023-24 school year; and that the parent's May 24, 2023 letter did not satisfy the notice requirements under Education Law § 3602-c (IHO Decision at pp. 4-5). Accordingly, the IHO denied the parent's requested relief and dismissed the parent's due process complaint notice with prejudice (id. at p. 6).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred by dismissing her due process complaint notice with prejudice.[1] The parent argues that the June 1 notice letter provided appropriate notice to the district and there was nothing "mysterious about the email nor was there any attempt to deceive" as indicated by the IHO in his decision. As relief, the parent requests for the dismissal to be without prejudice to allow her the opportunity to refile and "try again" to seek funding for SETSS and a bank of compensatory hours for the periods of SETSS missed (Req. for Rev. at p. 6).[2]

In an answer and cross-appeal, the district argues the IHO's finding that the parent failed to comply with the June 1 requirement should be upheld. The district requests that if it is determined that the parent complied with the June 1 requirement that the matter be remanded to the IHO for a hearing on the merits. As for the district's cross-appeal, the district argues that the SRO and IHO lack subject matter jurisdiction to adjudicate the parent's implementation claims. As relief, the district requests for its cross-appeal to be sustained and the parent's appeal be dismissed.

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[3] "Boards of education of all school districts of the state

[1] Despite proceeding pro se in this matter on appeal, the attorney who represented the parent at the impartial hearing was an attorney at the same law firm as the attorney who signed and submitted the parent's Notice of Intention to Seek Review and Case Information Statement, and the parent's Request for Review was written on what appears to be the same attorney's letterhead (compare Tr. p. 3, with Notice of Intention to Seek Review, and Req. for Rev. at p. 1).

[2] I note that the parent's first name is spelled differently on some of the pleadings filed with the Office of State Review.

[3] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[4] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

A. Preliminary Matters

1. Subject Matter Jurisdiction

At the outset it is necessary to address the issue of subject matter jurisdiction raised by the district in its cross-appeal appeal. Subject matter jurisdiction refers to "the courts' statutory or constitutional power to adjudicate the case" (Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89 [1998]). The district raised the argument at the IHO hearing in a motion to dismiss, which went unaddressed in the IHO's decision.

Recently in several decisions, the undersigned and other SROs have rejected the district's position that IHOs and SROs lack subject matter jurisdiction to address claims related to implementation of equitable services under State law (see, e.g., see, e.g., Application of a Student

[4] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 (Questions and Answers), VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

with a Disability, Appeal No. 25-067; Application of a Student with a Disability, Appeal No. 24-620; Application of a Student with a Disability, Appeal No. 24-615; Application of a Student with a Disability, Appeal No. 24-614; Application of a Student with a Disability, Appeal No. 24-612; Application of a Student with a Disability, Appeal No. 24-602; Application of a Student with a Disability, Appeal No. 24-595; Application of a Student with a Disability, Appeal No. 24-594; Application of a Student with a Disability, Appeal No. 24-589; Application of a Student with a Disability, Appeal No. 24-584; Application of a Student with a Disability, Appeal No. 24-574 Application of a Student with a Disability, Appeal No. 24-572; Application of a Student with a Disability, Appeal No. 24-564; Application of a Student with a Disability, Appeal No. 24-558; Application of a Student with a Disability, Appeal No. 24-547; Application of a Student with a Disability, Appeal No. 24-528; Application of a Student with a Disability, Appeal No. 24-525; Application of a Student with a Disability, Appeal No. 24-512 Application of a Student with a Disability, Appeal No. 24-507; Application of a Student with a Disability, Appeal No. 24-501; Application of a Student with a Disability, Appeal No. 24-498; Application of a Student with a Disability, Appeal No. 24-464; Application of a Student with a Disability, Appeal No. 24-461; Application of a Student with a Disability, Appeal No. 24-460; Application of a Student with a Disability, Appeal No. 24-441; Application of a Student with a Disability, Appeal No. 24-436; Application of the Dep't of Educ., Appeal No. 24-435; Application of a Student with a Disability, Appeal No. 24-392; Application of a Student with a Disability, Appeal No. 24-391; Application of a Student with a Disability, Appeal No. 24-390; Application of a Student with a Disability, Appeal No. 24-388; Application of a Student with a Disability, Appeal No. 24-386).

Under federal law, all districts are required by the IDEA to participate in a consultation process with nonpublic schools located within the district and develop a services plan for the provision of special education and related services to students who are enrolled privately by their parents in nonpublic schools within the district equal to a proportionate amount of the district's federal funds made available under part B of the IDEA (20 U.S.C. § 1412[a][10][A]; 34 CFR 300.132[b], 300.134, 300.138[b]). However, the services plan provisions under federal law clarify that "[n]o parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school" (34 CFR 300.137 [a]). Additionally, the due process procedures, other than child-find, are not applicable for complaints related to a services plan developed pursuant to federal law.

Accordingly, the district's argument under federal law is correct; however, the student did not merely have a services plan developed pursuant to federal law alone and the parent did not argue that the district failed in the federal consultation process or in the development of a services plan pursuant to federal regulations.

Separate from the services plan envisioned under the IDEA, the Education Law in New York has afforded parents of resident students with disabilities with a State law option that requires a district of location to review a parental request for dual enrollment services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]).[5]

[5] This provision is separate and distinct from the State's adoption of statutory language effectuating the federal

Education Law § 3602-c, concerning students who attend nonpublic schools, provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][b][1]). It further provides that "[d]ue process complaints relating to compliance of the school district of location with child find requirements, including evaluation requirements, may be brought by the parent or person in parental relation of the student pursuant to section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][c]).

However, the district asserts that neither Education Law § 3602-c nor Education Law § 4404 confer IHOs with jurisdiction to consider enhanced rates claims from parents seeking implementation of equitable services.[6]

Consistent with the IDEA, Education Law § 4404, which concerns appeal procedures for students with disabilities provides that a due process complaint may be presented with respect to "any matter relating to the identification, evaluation or educational placement of the student or the provision of a free appropriate public education to the student" (Educ. Law §4404[1][a]; see 20 U.S.C. § 1415[b][6]). State Review Officers have in the past, taking into account the legislative history of Education Law § 3602-c, concluded that the legislature did not intend to eliminate a parent's ability to challenge the district's implementation of equitable services under Education Law § 3602-c through the due process procedures set forth in Education Law § 4404 (see Application of a Student with a Disability, Appeal No. 23-121; Application of the Dep't of Educ., Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-068).[7] In addition, the New York Court of Appeals has explained that students authorized to received services pursuant to Education Law § 3602-c are considered part-time public school students under State Law (Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 184 [1988]), which further supports the conclusion that part-time public school students are entitled to the same legal protections found in the due process procedures set forth in Education Law § 4404.

However, the number of due process cases involving the dual enrollment statute statewide, which were minuscule in number until only a handful of years ago, have now increased to tens of thousands of due process proceedings per year within certain regions of this school district in the last several years. That increase in due process cases almost entirely concerns services under the dual enrollment statute, and public agencies are attempting to grapple with how to address this colossal change in circumstances, which is a matter of great significance in terms of State policy. Policy makers have attempted to address the issue.

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requirement that the district of location "expend a proportionate amount of its federal funds made available under part B of the individuals with disabilities education act for the provision of services to students with disabilities attending such nonpublic schools" (Educ. Law § 3602-c[2-a]).

[6] It is worth noting here that the parent's due process complaint notice did not only include implementation claims, but also included an allegation that the failure to convene a CSE meeting prior to the start of the 2023-24 school year was a denial of a FAPE to the student (Parent Ex. A at p. 2). There was no explanation in the district's motion to dismiss or on appeal as to how the parent's claims related to development of an educational program prior to the start of the 2023-24 school year could be considered outside of the jurisdiction of the due process system.

[7] The district did not seek judicial review of these decisions.

In May 2024, the State Education Department proposed amendments to 8 NYCRR 200.5 "to clarify that parents of students who are parentally placed in nonpublic schools do not have the right under Education Law § 3602-c to file a due process complaint regarding the implementation of services recommended on an IESP" (see "Proposed Amendment of Section 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Due Process Hearings," SED Mem. [May 2024], available at https://www.regents.nysed.gov/sites/regents/files/524p12d2revised.pdf).[8] Ultimately, however, the proposed regulation was not adopted. Instead, in July 2024, the Board of Regents adopted, by emergency rulemaking, an amendment of 8 NYCRR 200.5, which provides that a parent may not file a due process complaint notice in a dispute "over whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services" (8 NYCRR 200.5[i][1]). The amendment to the regulation does not apply as the amendment has been enjoined and suspended in an Order to Show Cause signed October 4, 2024 (Agudath Israel of America v. New York State Board of Regents, No. 909589-24 [Sup. Ct., Albany County, Oct. 4, 2024]). Specifically, the Order provides that:

pending the hearing and determination of Petitioners' application for a preliminary injunction, the Revised Regulation is hereby stayed and suspended, and Respondents, their agents, servants, employees, officers, attorneys, and all other persons in active concert or participation with them, are temporarily enjoined and restrained from taking any steps to (a) implement the Revised Regulation, or (b) enforce it as against any person or entity

(Order to Show Cause, O'Connor, J.S.C., Agudath Israel of America, No. 909589).[9]

Consistent with the district's position that there is not and has never been a right to bring a due process complaint for implementation of IESP claims or enhanced rate for services, State guidance issued in August 2024 noted that the State Education Department had previously "conveyed" to the district that:

> parents have never had the right to file a due process complaint to request an enhanced rate for equitable services or dispute whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services. Therefore, such claims should be dismissed on jurisdictional grounds, whether they were filed before or after the date of the regulatory amendment.

[8] In this case, the district continues to press the point that the parent has no right to file any kind of implementation claim regarding dual enrollment services, regardless of whether there are allegations about rates, which is more in alignment with the text of the proposed rule in May 2024, which was not the rule adopted by the Board of Regents.

[9] On November 1, 2024, Albany County Supreme Court issued a second order clarifying that the temporary restraining order applied to both emergency actions and activities involving permanent adoption of the rule until the petition was decided (Order, O'Connor, J.S.C., Agudath Israel of America, No. 909589-24 [Sup. Ct., Albany County, Nov. 1, 2024]).

("Special Education Due Process Hearings - Rate Disputes," Office of Special Educ. [Aug. 2024]).[10]

However, acknowledging that the question has publicly received new attention from State policymakers as well as at least one court at this juncture and appears to be an evolving situation, given the implementation date set forth in the text of the amendment to the regulation and the issuance of the temporary restraining order suspending application of the regulatory amendment, the amendments to the regulation may not be deemed to apply to the present matter. Further, the position set forth in the guidance document issued in the wake of the emergency regulation, which is now enjoined and suspended, does not convince me that the Education Law may be read to divest IHOs and SROs of jurisdiction over these types of disputes.

Based on the foregoing, though the IHO did not address the district's motion to dismiss on the record or in his decision, the district's argument that the matter should be dismissed based on subject matter jurisdiction is rejected.

2. Additional Evidence Submitted on Appeal

The parent submitted additional evidence with her request for review, consisting of an email chain, dated August 1, 2024 to August 28, 2024, between the district CSE office and the law firm who represented the parent during the impartial hearing (SRO Ex. 1).[11] The parent alleges that the email proves the district acknowledged that she timely sent the June 1 letter on May 24, 2023.[12]

The district argues that the emails submitted by the parent as additional evidence should not be considered and that the facts raised by the parent within the request for review should not be considered. The district argues the parent was represented at the hearing by counsel and made the strategic choice not to appear and testify and therefore cannot now use the request for review as a "vehicle for curing the failure to provide more evidence at the IHO level" (Answer and Cross-Appeal ¶ 8).

Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not

[10] Neither the guidance nor the district indicated if this jurisdictional viewpoint was conveyed publicly or only privately to the district, when it was communicated, or to whom. There was no public expression of these points that the undersigned was aware of until policymakers began rulemaking activities in May 2024; however, as the number of allegations began to mount that the district's CSEs had not been convening and services were not being delivered, at that point the district began to respond by making unsuccessful jurisdictional arguments to SROs in the past, which decisions were subject to judicial review but went unchallenged (see e.g., Application of a Student with a Disability, 23-068; Application of a Student with a Disability, 23-069; Application of a Student with a Disability, 23-121). The guidance document is no longer available on the State's website, thus, a copy of the August 2024 rate dispute guidance has been added to the administrative hearing record

[11] For purpose of this decision, the additional document submitted by the parent with her request for review shall be referred and cited as "SRO Ex. 1" (SRO Ex. 1 at pp. 1-10).

[12] I note that the parent indicated she sent the June 1 letter on May 24, 2024; however, a review of the letter indicates it was dated May 24, 2023 (see Parent Ex. C).

have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068).

Upon independent review of the request for review and the document submitted by the parent as additional evidence, I agree with the district's arguments that most of the request for review contains significant factual allegations that could have been presented during the impartial hearing and was not presented for reasons known only to the parent and parent's counsel at the hearing.

Regarding the additional document submitted, the emails are dated August 1, 2024 to August 28, 2024 and relate to a prior due process complaint notice filed July 12, 2024 that was subsequently withdrawn by the parent's counsel on September 20, 2024—seventeen days prior to the filing of the October 7, 2024 due process complaint notice in this matter (see IHO Decision at p. 2 n. 4; Parent Ex. A). According to the emails, the parent's attorney's law firm, who represented the parent during the November 18, 2024 impartial hearing, was a recipient of the emails (SRO Ex. 1). A legal assistant at the parent's attorney's law firm responded to the CSE's request for the original email chain regarding the June 1 notice letter (SRO Ex. 1 at p. 3). Accordingly, the email chain could have been offered at the time of the impartial hearing and the undersigned declines to accept the parent's additional evidence.

Regarding the factual allegations raised in the parent's request for review that are not connected to the evidence admitted during the proceeding, the district argues such allegations should not be considered arguing that the parent is attempting to cure her own failure to provide more evidence regarding the June 1 notice at the impartial hearing level.

State regulation requires that a request for review "identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding" (8 NYCRR 279.4[a]). Further, section 279.8 of the State regulations requires that a request for review shall set forth:

> (1) the specific relief sought in the underlying action or proceeding;
>
> (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and
>
> (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number

(8 NYCRR 279.8[c][1]-[3]). Here, the parent did not number each issue and makes minimal citations to the evidence in the hearing record; specifically, the parent makes two reference to the May 24, 2023 letter (Parent Ex. C), and one reference to the IHO's decision (IHO Decision at p. 5). The parent also indicates that she did not have access to the transcript to support her allegation that neither the district nor the judge sought to question her during the impartial hearing regarding the June 1 letter (see Req. for Rev. at p. 2). Though the parent did not conform to practice regulations governing appeals, it is clear that the parent is identifying the IHO's determination that the May 24, 2023 letter did not satisfy the June 1 notice requirement as the issue to be reviewed on appeal (see Req, for Rev. at pp. 2-3). The parent also indicates that the relief sought is a reversal of the dismissal with prejudice to allow her the chance to try to seek funding again (Req. for Rev. at p. 6). As to the factual statements made by the parent, the undersigned will not consider any statements made by the parent which were not presented during the impartial hearing through witness testimony or as part of the admitted documentary evidence; accordingly, the parent's statements regarding her intent to submit the June 1 letter with the help of an agency shall not be considered.

3. IHO Bias

It should be noted that the parent also raised allegations that the IHO in this matter exhibited bias towards her due to her religious beliefs and the religious community she lives within. It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, affording each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]). In this instance, the record does not support the parent's allegation that the IHO exhibited bias.

Rather than pointing to a specific allegation that the IHO exhibited bias, the parent focuses on a results-based argument. Generally, the parent asserts that "[i]f the Judge distrusts the agencies and institutions that service [her] community, the Judge will find every possible way to deny relief" and that "if the Judge has no preconceived notions of [her] community, the Judge will direct the [district] to fund the services" (Req. for Rev. at pp. 4-5).[13] The parent further asserted that having this particular IHO appointed would mean that "your chances of securing funding resulting from

[13] The parent raises questions about the IHO's analysis of her June 1 letter; however, all of these questions relate to the parent's objection to the IHO's findings in this proceeding. The parent also asserts that a district attorney asserted, as part of a proceeding in federal court, that there was fraud involved in parents seeking unimplemented SETSS; however, there is nothing in the hearing record connecting the alleged statement made on behalf of the district to the IHO in this proceeding.

the District's implementation failure [we]re next to zero" (id. at p. 5). Accordingly, the parent's argument generally asserts IHO bias as the primary reason for any parent losing on a request for funding for SETSS.

Initially, to the extent that the parent disagrees with the conclusion reached by the IHO, such disagreement does not provide a basis for finding actual or apparent bias by the IHO (see Chen v. Chen Qualified Settlement Fund, 552 F.3d 218, 227 [2d Cir. 2009] [finding that "[g]enerally, claims of judicial bias must be based on extrajudicial matters, and adverse rulings, without more, will rarely suffice to provide a reasonable basis for questioning a judge's impartiality"]; see also Liteky v. United States, 510 U.S. 540, 555 [1994] [identifying that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion"]; Application of a Student with a Disability, Appeal No. 13-083).

The parent tried to substantiate her allegation by stating "[her] lawyer" explained to her that "while he [wa]s successful in obtaining funding for unimplemented services in approximately 90% of his cases stemming from students in [her] community, his loss rate with [the IHO] for funding for services [wa]s above 65%" (Req. for Rev. at p. 5 n. 3). Although the parent's concerns are understandable, in that she is attempting to obtain funding for services for her child, it is worth noting, first, that the statement expressed to her by her attorney shows far more balance than the "zero" chance of winning expressed in the parent's request for review. Review of the hearing record in this matter also demonstrates that the IHO did not exhibit bias during the proceeding and was not as one-sided as described by the parent, although he did ultimately rule in favor of the district. The parent was represented by an attorney and the IHO allowed the parent, through her attorney, to present evidence and witness testimony during the impartial hearing (Tr. p. 1-40). Additionally, the district filed a motion to dismiss based on subject matter jurisdiction and the IHO decided to proceed to an impartial hearing without ruling on the motion to dismiss, further showing that IHO was not trying to "find every possible way to deny relief" as he allowed to parent to present her case, deciding the matter on the merits (id.; see IHO Ex. I).

Additionally, with respect to the "statistics" presented by the parent, regardless of what is shown by the parent's attorney's off the cuff remarks about the statistics of his cases "statistics alone, no matter how computed, cannot establish extrajudicial bias. There is no authority for, and no logic in, assuming that either party to a litigation is entitled to a certain percentage of favorable decisions" (In re Intl. Bus. Machines Corp., 618 F.2d 923, 930 [2d Cir. 1980]; see Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F. Supp. 2d 361, 368 [S.D.N.Y. 2010] [noting that allegations regarding the percentage of rulings favorable to a school districts or disabled children were not cognizable claims]; E. Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 595 n.7 [S.D.N.Y. 2011], aff'd sub nom. R.E., 694 F.3d 167 [noting the uniform rejection of arguments based upon plaintiffs statistical or spreadsheet analysis of unfavorable outcomes by an administrative hearing officer]).

Based on all of the above, the parent's assertion of bias against the IHO must be dismissed, and the matter considered based upon analysis of the applicable law and individual facts of the case.

B. June 1 Request

Here, the IHO dismissed the parent's claims related to the 2023-24 school year with prejudice on the basis that the parent failed to establish she made a timely request for special education services prior to June 1, 2023 (IHO Decision at pp. 2, 4-6).

The State's dual enrollment statute requires parents of a New York State resident student with a disability who is parentally placed in a nonpublic school and for whom the parents seek to obtain educational services to file a request for such services in the district where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]). With respect to a parent's awareness of the requirement, the Commissioner of Education has previously determined that a parent's lack of awareness of the June 1 statutory deadline does not invalidate the parent's obligation to submit a request for dual enrollment by the June 1 deadline (Appeal of Austin, 44 Ed. Dep't Rep. 352, Decision No. 15,195, available at https://www.counsel.nysed.gov/ Decisions/volume44/d15195; Appeal of Beauman, 43 Ed Dep't Rep 212, Decision No. 14,974 available at https://www.counsel.nysed.gov/Decisions/volume43/d14974). Specifically, the Commissioner stated that Education Law § "3602-c(2) does not require [the district] to post a notice of the deadline" and that a parent being "unaware of the deadline does not provide a legal basis" for the waiver of the statutory deadline for dual enrollment applications (Appeal of Austin, 44 Ed. Dep't Rep. 352).

The issue of the June 1 deadline fits with other affirmative defenses, such as the defense of the statute of limitations, which are required to be raised at the initial hearing (see M.G. v. New York City Dep't of Educ., 15 F. Supp. 3d 296, 304, 306 [S.D.N.Y. 2014] [holding that the limitations defense is "subject to the doctrine of waiver if not raised at the initial administrative hearing" and that where a district does "not raise the statute of limitations at the initial due process hearing, the argument has been waived"]; see also R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *4-*6 [S.D.N.Y. Sept. 16, 2011] [noting that the IDEA "requir[es] parties to raise all issues at the lowest administrative level" and holding that a district had not waived the limitations defense by failing to raise it in a response to the due process complaint notice where the district articulated its position prior to the impartial hearing]; Vultaggio v. Bd. of Educ., Smithtown Cent. Sch. Dist., 216 F. Supp. 2d 96, 103 [E.D.N.Y. 2002] [noting that "any argument that could be raised in an administrative setting, should be raised in that setting"]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011], quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *12 [S.D.N.Y. Sept. 22, 2011]).

The parent has not alleged that the district did not timely raise such defense or that it waived its defense, rather the parent generally stated that the district filed a due process response that indicated the district intended to pursue all applicable defenses but did not specifically indicate it was going to raise a defense based on a failure of the parent to submit a request on or prior to June 1 (see Req. for Rev. at p. 3). The IHO noted that the district raised the affirmative defense during

its opening and closing statements (IHO Decision at p. 4; see Tr. pp. 10, 37). As indicated above, there was only one hearing date (see Tr. pp. 1-40). Overall, as determined by the IHO, the district properly raised the June 1 defense during the hearing.

The IHO noted that the letter admitted into evidence consisted of two pages with the first page purporting to be an email sent May 24, 2023 (IHO Decision at p. 4). The IHO noted that the top of the first page "apparently list[ed] sender as [the student] via Student Advocacy [email address]" and that the email indicated it was sent to the parent's email, the CSE, and another individual at the district; that the body of the email identified the student and stated that if there were any questions or concerns, "please contact" the parent at the parent's indicated email address; that the email contained the parent's name at the bottom of the body; and that the email indicated that the email contained an attachment (id.; see Parent Ex. C at p. 1). The IHO also noted that the second page of the exhibit purported to be the attachment reflected in the email (IHO Decision at p. 4; see Parent Ex. C at p. 2). According to the IHO, the attachment was a district form requesting services, all of the fields on the form were typewritten, and the parent's signature was also typewritten and was preceded by a "/s/" (IHO Decision at p. 4).

The IHO then determined that the parent's May 24, 2023 letter did not satisfy the notice requirements under Education Law § 3602-c (IHO Decision at pp. 4-5). The IHO noted that the parent offered no witness testimony to explain the notice (id. at p. 4). The IHO then found that despite the parent's name appearing by reference in the sender information and again appearing at the bottom of the email, the email was not sent by the parent (id.). The IHO determined that the appearance of the sender was "intentionally convoluted so as to be construed as coming from [the p]arent when it in fact did not" and was rather sent by a third party email address (id.). The IHO also noted that the parent's email address appeared in the "to" line rather than the "from" line (id.). The IHO determined that the email was "clearly sent by an email account, which may or may not be affiliated with a private agency and included the parent on the communication (id. at pp. 4-5). Lastly, in addressing the attachment to the email, the IHO noted that the June 1 letter was completely typewritten and the field identifying the school the student attended contained the name of the school referenced on the May 2022 IESP which was different from the school reflected in the parent's October 2024 due process complaint notice (id. at p. 5). Overall, the IHO determined that the parent did not prepare the June 1 letter and found it was "likely that it was prepared by whoever sent the email in the first place" without any involvement from the parent (id.).

The IHO then noted that, while a June 1 letter requesting dual enrollment services may be sent by counsel on a parent's behalf, it was unclear if the same applied to a letter "sent by a mysterious, anonymous email account attempting to give the appearance that Parent was initiating communication to District when in fact they were not"; specifically finding that there was no evidence indicating that the parent authorized anyone to act on her behalf or even knew that a request was being made on her behalf prior to the email being sent (IHO Decision at p. 5; citing Application of a Student with a Disability, Appeal No. 24-042).

Initially, I note that in Application of a Student with a Disability, Appeal No. 24-042, I rejected the district's argument that an attorney representing a parent was precluded from assisting or communicating with a school district on behalf of a client with regard to the June 1 request requirement in § 3602-c, as the district did not present authority for such a position and I had not

found any such authority myself (Application of a Student with a Disability, Appeal No. 24-042 at p. 7).

Under § 3602-c, there is no explicit prohibition against parents authorizing a third-party to send a June 1 request to a school district on the parents' behalf (see Educ. Law § 3602-c[2]). However, the statute does indicate that services shall be provided to students who attend nonpublic schools within the district "upon the written request of the parent or person in parental relation" (id.). In this instance, despite the IHO's finding that it was unclear if it was permissible for an agency to send a June 1 letter on the parent's behalf, the IHO's decision relied more on the lack of evidence showing that the parent had authorized the letter than it did on who actually delivered the letter to the district (see IHO Decision at p. 5). Additionally, the district did not assert, in this proceeding, that the June 1 letter should be invalidated because it was sent by an agency, rather than by the parent herself. In fact, during the impartial hearing, the district simply argued that the letter should be disregarded as the parent did not testify that it was sent (Tr. p. 37). Accordingly, I will not determine the outcome based on arguments that even the district has not raised and, instead, review of the IHO's decision will be confined to whether the IHO was correct in determining that the letter should have been disregarded without additional evidence that the parent authorized transmission of the letter on her behalf.

Turning to the specific facts available, the hearing record shows that a letter was sent from an agency, purportedly on behalf of the parent, to the district on May 24, 2023, prior to June 1, 2023, and there is no evidence that the letter was not received by the district (Parent Ex. C). Additionally, the district did not introduce any witness testimony or documentary evidence to refute that the letter was transmitted to district or what the district did as an action in response to receiving this letter (see Tr. pp. 1-40). The IHO asked the district representative what its position was regarding the June 1 letter and the district representative responded the district had "no particular position on that other than to say that the parent did not testify in this matter" and so the district representative could not be sure that the parent sent the June 1 letter (Tr. p. 37). As noted by the IHO, the parent was included in the email and attachment form and there is no indication that the parent did not intend to send the letter (see Parent Ex. C). Accordingly, although the hearing record is not as detailed as one would expect for a simple threshold issue that should be easy to establish on either side, overall, the hearing record minimally weighs in favor of finding in favor of the parent's assertion that a request for equitable services for the 2023-24 school year was sent to the district on the parent's behalf prior to June 1, 2023.

Based on the foregoing, the IHO's dismissal with prejudice on the basis of the June 1 letter will be reversed and the case remanded because the IHO did not make any alternative findings with respect to the issues raised in the parent's due process complaint notice.[14] When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not

[14] The parent in her request for review requested that the IHO's dismissal with prejudice be reversed to allow her another chance to refile; however, this would not be appropriate in this matter. As requested by the district, a remand is more appropriate because a hearing was held on the merits and both parties were given the opportunity to present evidence and witness testimony regarding the claims raised in the parent's October 7, 2024 due process complaint notice. Though the parent raises a claim that the IHO was biased, as indicated above, the hearing record does not support this claim and thus it is unnecessary to order a new IHO to hear this matter on remand.

address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). Here, the IHO should have—at a minimum, and out of an abundance of caution—made determinations regarding the issues in the first instance. In the event of an administrative or judicial review, in which the reviewing body might disagree with a singular finding, it is important to have the remaining issues and the rationales addressed (cf. F.B., 923 F. Supp. 2d at 589). Also, such an analysis serves as a guide to the district as to whether it should undertake corrective action in the future in order to comply with the IDEA.

The IHO is directed to conduct a three prong Burlington-Carter analysis of the evidence submitted by the parties during the impartial hearing held on November 18, 2024, and issue a written decision on the merits of the parent's claims.

VII. Conclusion

For the reasons described above, this matter is remanded to the IHO to issue a written decision on the merits of the parent's claims asserted in her October 7, 2024 due process complaint notice, as clarified by the parties and IHO upon remand.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated November 27, 2024, dismissing the parent's due process complaint notice with prejudice, is reversed; and

IT IS FURTHER ORDERED that this matter is remanded to the IHO for further proceedings in accordance with this decision; and

IT IS FURTHER ORDERED that in the event that the IHO cannot hear this matter upon remand, another IHO shall be appointed.

Dated: **Albany, New York**
May 21, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER